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EXAMINER EASTWOOD, DAVID C				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/552,841

**Applicant(s)**

FUKUZAWA ET AL.

**Examiner**

David Eastwood

**Art Unit**

3731

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 December 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 October 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsman's Patent Drawing Review (PTO-945)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Response to Amendment***

Receipt is acknowledged of applicant's amendment filed 12/14/2010. Claims 1-28 are pending and an action on the merits is as follows.

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-2, 6-10, 12-19, 21-22, 24-28 are rejected under 35 U.S.C. 102(b) as being anticipated by List (US 2003/0028126).

Regarding Claim 1, List discloses a lancing apparatus for moving a lancing element in a lancing direction from a wait position to a lancing position to lance an intended portion with the lancing element, the lancing apparatus comprising: a first member (20) which is reciprocally movable in the lancing direction and in a retreating direction which is opposite from the lancing direction; and a second member (4) which moves along with the lancing element and performs reciprocal movement in the lancing direction and the retreating direction in accordance with the movement of the first

member (Figures 1 and 3), movement conversion means (13,14,16,17,18) (capable of being) for converting the reciprocal movement of the first member into the reciprocal movement of the second member in a manner such that a directional change of movement of the second member from the lancing direction to the retreating direction is (capable of being) performed during a one-way stroke of the first member, in one of the lancing direction and the retreating direction (progression of figure 1 a-d, especially note fig. 1b-1d and the returned state of figure 1a where the second member (4) is capable of being held in a retracted state during compression of spring 29 beginning a stroke movement of the first member (20) in a retracting direction, release of second member (4) at the height of the retracting movement of the first member (20), the second member would begin movement in a lancing direction, via biasing spring 29, as the first member begins the second stage of the stroke in a lancing direction, force  $F_a$  is applied to pin 16 as depicted in figure 1(d) which retracts the second member to the state depicted in fig. 1a. Furthermore, as pin 16 travels in a orthogonal direction to the longitudinal axis of the device the second member is capable of retreating during one stroke of the first member compare fig. 1a with 1d), wherein the first member is reciprocally movable between a first fixed position (Figure 1a) and a second fixed position (Figure 1b); wherein the second member performs one cycle of reciprocal movement between a third fixed position (position secured by element 24 depicted in fig. Figure 1b and c) and a fourth fixed position (position in which the second element is fully extended note position of second member depicted in Figure 1d) during one cycle of reciprocal movement between the first fixed position and the second fixed position.

Regarding claim 2, List discloses the second member performs turning-back movement (due to force Fa depicted in fig. 1 a-d) while the first member moves straight between the first fixed position and the second fixed position (with reference to the progression of Figures 1 a-d note that if Force Fa is applied such that it overcomes Force Fs depicted in figure 1b and the second element 4 is released the second member would initially protrude to the distal end of the device and then retract due to continued application of Force Fa to return to the state depicted in fig. 1a during forward movement of the first element which is biased by spring 29),

Regarding claims 6-10, 12-19, 21-22 and 24-26, List discloses the movement conversion means comprises a third member (12) for connecting the first member (20) and the second member (4) to each other and converting movement of the first member into reciprocal movement of the second member (Figure 1 a-d), wherein the third member (12) includes a rotation shaft (18) whose position is fixed, a first movable portion (14) which engages the first member and is rotatable around the rotation shaft, and a second movable portion (13) which engages the second member and is rotatable around the rotation shaft (Figure 1a), wherein the first member includes a first engagement portion (18) for allowing the rotation of the first movable portion; and wherein the second member includes a second engagement portion (17) for allowing the rotation of the second movable portion, wherein at least one of the first and the second engagement portions includes an inclined portion which is inclined with respect to a transverse direction extending perpendicularly to the lancing and the retreating directions (Figure 1a and c items 14 and 13), wherein the inclined portion has opposite

ends each of which is connected to a straight portion (20) extending in the transverse direction (Figure 1b), wherein the inclined portion is provided in one of the first and the second engagement portions, where as the other of the first and the second engagement portions extends substantially in the transverse direction (Figure 1 a and c), wherein the first member is fixed while being biased when the lancing element is positioned at the wait position (Figure 1 b), and the first member is moved by the biasing force when released from the fixed state (Figure 1c), wherein the third member (12) is pivotable to convert the movement of the first member into the reciprocal movement of the second member by the pivotal movement (Figure 1 a-b), wherein the third member (12) includes a pivot shaft (16), a first movable portion (14) which engages the first member and is pivotable around the pivot shaft, and a second movable portion (13) which engages the second member and is pivotable around the pivot shaft, wherein the first member includes an engagement portion (portion of 18 which engages movable portion 14) for engaging the first movable portion (14) and controlling movement of the third member in accordance with a position where the first movable portion engages, wherein the engagement portion includes an inclined portion for pivoting the third member to move the second member in the lancing direction, wherein the engagement portion includes an additional inclined portion for pivoting the third member to move the second member in the retreating direction (figure 1 a-d), wherein the engagement portion includes a straight portion (20) extending in the lancing and the retreating directions for moving the first member in the lancing direction or the retreating direction without moving the second and the third members in the lancing

and the retreating directions (Figure 1 b), wherein the first movable portion includes a first (18) and a second pins (16); and wherein the engagement portion includes an inclined portion (14,13) with which the first pin engages in moving the second member in the lancing direction and with which the second pin engages in moving the second member in the retreating direction (Figure 1 a-d), wherein the first member includes an additional engagement portion (34) with which the second pin selectively engages when the first member moves in the retreating direction (Figure 3), wherein the first member is movable in a crossing direction crossing the lancing and the retreating directions to pivot the third member to move the second member in the retreating direction (Figure 1 a-d), further comprising an actuating member (35) for moving the first member; wherein each of the first member and the actuating member includes an inclined surface (37), and the first member moves in the crossing direction by moving the inclined surface of the actuating member along the inclined surface of the first member (Figure 3), further comprising a guide (11) which moves along with the first member in the lancing direction or the retreating direction, and a resilient member (16) for connecting the guide and the first member to each other and biasing the first member in the crossing direction crossing the lancing and the retreating directions (Figure 1a).

Regarding claim 27, List discloses a lancing apparatus for moving a lancing element in a lancing direction from a wait position to a lancing position to lance an intended portion with the lancing element, the lancing apparatus comprising, a first member (20) which is reciprocally movable in the lancing direction and in a retreating direction which is opposite from the lancing direction, a second member (4) which

moves along with the lancing element and performs reciprocal movement in the lancing direction and the retreating direction in accordance with the movement of the first member (note figures 1 and 3) and a movement conversion mechanism (13,14,16,17,18) (capable of being) for converting the reciprocal movement of the first member into the reciprocal movement of the second member, the movement conversion mechanism including a stationary pin(16) held at a fixed position (note the pin 16 is stationary and fixed relative to the link arms in that the pin does not deviate from it's position relative to the link arm e.g. an axis of the pin is always perpendicular to an axis of the link arm therefore it is stationary and fixed relative to the link arm), a first link arm (14) connected to the first member and to the stationary pin for pivoting about the stationary pin, and a second link arm (13) connected to the first link arm and to the second member (4) (note figure 1 a-d) (capable of being) for pivoting about the stationary pin, an angle being formed between the first and second link arms in a pivoting direction of the first and second link arms about the stationary pin (note angles formed between link arms as depicted in the progression of figures 1a-1d).

Regarding claim 28, List discloses a lancing apparatus for moving a lancing element in a lancing direction from a wait position to a lancing position to lance an intended portion with the lancing element, the lancing apparatus comprising, a first member (20) which is reciprocally movable in the lancing direction and in a retreating direction which is opposite from the lancing direction, a second member (3) which moves along with the lancing element and performing reciprocal movement in the lancing direction and the retreating direction in accordance with the movement of the



first member (note figures 5a-c) and a movement conversion mechanism (13,14,17,18,50-54) (capable of being) for converting the reciprocal movement of the first member into the reciprocal movement of the second member, the movement conversion mechanism including a stationary pin (pin within joint 52) held at a fixed position (note the pin is stationary relative to block 54), a link member (50) supported on the stationary pin for pivoting about the stationary pin (note figures 5a-c), wherein the link member (as discussed above) includes a first arm (portion of link 50 connected to element 14) carrying a first moveable pin (pin within joint 53) connected to the first member (via link 14), and a second arm (portion of link 50 connected to element 13) carrying a second movable pin (pin within joint 51) connected to the second member (via link 13), the first arm being connected to the second arm at an angle that is defined as an angle between the first and the second arms in a pivoting direction of the link member about the stationary pin, said angle being invariable regardless of positions of the first and second members (note figures 5 a-c where element 50 comprising first and second arms remains linear and the angle defined by the first and second arms as discussed above never changes regardless of the positions of the first and second members).

3. Claims 1-4, 6-11, 14-18, 20 and 24 are rejected under 35 U.S.C. 102(e) as being anticipated by Garthe et al. (US 2003/0225429) (hereafter Garthe).

Regarding Claim 1-4 and 6-10, Garthe discloses a first member (60) which is reciprocally movable in the lancing direction and in a retreating direction which is opposite from the lancing direction; and a second member (40) which moves along with

the lancing element and performs reciprocal movement in the lancing direction and the retreating direction in accordance with the movement of the first member (Figure 4a), a movement conversion means (51) (capable of being) for converting the reciprocal movement of the first member into the reciprocal movement of the second member (as 51 rotates either caused by spring 50 or manual reciprocation of element 60 and associated pin 61 to move within groove 53 causing rotation of element 51 which in turns causes reciprocating motion of element 40) in a manner such that a directional change of movement of the second member from the lancing direction to the retreating direction is performed during a one-way stroke of the first member, in one of the lancing direction and the retreating direction (note explanation above and the progression of figures 4 a-c), the first member is reciprocally movable between a first fixed position (Figure 4a) and a second fixed position (Figure 4c); wherein the second member performs one cycle of reciprocal movement between a third fixed position (Figure 4b) and a fourth fixed position (Figure 4c) during one cycle of reciprocal movement between the first fixed position and the second fixed position, and the second member performs turning-back movement during when the first member moves straight between the first fixed position and the second fixed position (progression of figures 4b and 4c), the lancing element is positioned at the lancing position when the second member is positioned at the third fixed position (note figure 4b), and the lancing element is positioned at the wait position when the second member is positioned at an intermediate region between the third fixed position and the fourth fixed position (Figure 4 progression from a-c while the second member and associated element 41 are

positioned along cam 52 as depicted in figure 4a), wherein the lancing element (30') moves from the wait position to the lancing position when the first member moves in the retreating direction (Figure 4b where element 60 begins retraction to the proximal end as depicted in the progression of figure 4b and c), the movement conversion means comprises a third member (portion of 51 between first and second member) for connecting the first member and the second member to each other and converting movement of the first member into reciprocal movement of the second member (Figure 4), wherein the third member includes a rotation shaft whose position is fixed, a first movable portion (61) which engages the first member and is rotatable around the rotation shaft, and a second movable portion (41) which engages the second member and is rotatable around the rotation shaft (Figure 4a), wherein the first member includes a first engagement portion (53) for allowing the rotation of the first movable portion; and wherein the second member includes a second engagement portion (52) for allowing the rotation of the second movable portion, wherein at least one of the first and the second engagement portions includes an inclined portion which is inclined with respect to a transverse direction extending perpendicularly to the lancing and the retreating directions (Figure 4a), wherein the inclined portion has opposite ends each of which is connected to a straight portion (61, 41) extending in the transverse direction (Figure 4a),

Regarding claims 11, 14-18, 20 and 24, Garthe discloses wherein the first and the second movable portions, the movable portion which engages the inclined portion moves through the inclined portion when the lancing element moves from the wait position to the lancing position and moves through the straight portion when the lancing

element moves from the lancing position in the retreating direction (Progression of Figure 4a-c), wherein the third member (51) is pivotable to convert the movement of the first member into the reciprocal movement of the second member by the pivotal movement (Figure 4c), wherein the third member includes a pivot shaft, a first movable portion (walls defining groove 53) which engages the first member (via element 61) and is pivotable around the pivot shaft (walls defining groove 53 rotate about the shafts longitudinal axis and thus are pivotable around the pivot shaft), and a second movable portion (walls defining groove 52) which engages the second member (via element 41) and is pivotable around the pivot shaft (note pivotable interpretation cited above), wherein the first member includes an engagement portion (61) for engaging the first movable portion and (capable of) controlling movement of the third member in accordance with a position where the first movable portion engages (Figure 4a), wherein the engagement portion includes an inclined portion (incline within groove 53 which corresponds to the incline portion of groove 52 for moving the element 40 in a lancing direction) for pivoting the third member to move the second member in the lancing direction, wherein the engagement portion includes an additional inclined portion (incline portion of groove 53 which corresponds to the incline portion of groove 52 for moving the element 40 in a retracting direction) for pivoting the third member to move the second member in the retreating direction (Figure 4c), further comprising a resilient member (41) for moving the second member in the retreating direction after the intended portion is lanced with the lancing element (Figure 4a path 52), wherein the first member (60) is movable in a crossing direction crossing the lancing and the retreating

directions to pivot the third member (51) to move the second member in the retreating direction (Figure 4a-c).

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Garthe et al (US 2003/0225429) (hereafter Garthe).

**Regarding to claim 5**, Garthe discloses the claimed invention except for the motion of the first and second members is phase shifted by substantially 90 degrees. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the pivot shaft such that the motion of the first and second members is phase shifted by substantially 90 degrees since it has been held that where

the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

7. Claim 23 is rejected under 35 U.S.C. 103(a) as being unpatentable over List (US 2003/0028126).

**Regarding Claim 23**, List discloses the claimed invention except for the first pin is larger in diameter than the second pin and the additional engagement portion has a width smaller than the diameter of the first pin. It would have been an obvious matter of design choice to construct the first pin larger in diameter than the second pin and the additional engagement portion having a width smaller than the diameter of the first pin, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

### ***Response to Arguments***

1. Applicant's arguments filed 12/14/2010 have been fully considered but they are not persuasive.
2. Regarding Applicants arguments with respect to the "means for" language set forth in claim 1. The examiner is acknowledging the applicant's intentions of invoking 35 U.S.C. 112 6th paragraph by using the term **"means for"** or **"Step for"** in claim 1. However, it should be noted that Applicant has claimed structure, material, or acts for achieving the specified function and therefore fails the three prong test set forth in MPEP 2181 for determining eligibility of claim language to invoke 35 U.S.C. 112 6th

paragraph. Claim 1 recites *inter alia* "a first member.....second member.... and movement converting means for..." Page 15 of the instant specification recites "***the lancet moving mechanism 3 comprises a link member 30, the movable plate 31 and the lancet holder 32. The lancet moving mechanism 3 converts the reciprocal movement of the movable plate 31 into the reciprocal movement of the lancet holder 32 via circular motion of the link member 30.***" The first and second members are clearly disclosed as part of the movement conversion means 3, If the movement conversion means is the moving mechanism 3 as recited in the instant specification then the first and second members are part of the movement conversion means and therefore claiming the first and second members disqualifies the claim from invoking 112 6<sup>th</sup> paragraph. This is further evidenced by the specification in page 17 of the instant specification which states "*The movable plate 31 includes a groove 31A, the actuating portion 31B and a hook 31C. The groove 31A serves to allow the movement of the first movable pin 30a of the link member 30 (See Fig. 3). The groove 31A includes an inclined groove portion 31Aa extending in a direction inclined with respect to the lancing and retreating directions N1, N2, and straight groove portions 31Ab connected to opposite ends of the inclined groove portion 31Aa. As will be understood from Figs. 15A-15D and 16, the first movable pin 30a moves along the inclined groove portion 31Aa at least when the lancet moves from the wait position toward the lancing position and moves along the straight groove portions 31Ab at least when the lancet 1 moves from the lancing position in the 20 retreating direction N2. With the provision of the above groove 31A, the position of the movable plate 31 in the housing 2 is*

*determined based on the position of the first movable portion 30a itself in the lancing and the retreating directions N1, N2 and the position 25 of the movable portion 30a in the groove 31A."* As can be clearly seen the movement conversion means as can be best construed from the instant specification includes the structure of the first and second members.

3. Regarding Applicant's arguments with respect to the List reference. Applicant proffers that List fails to disclose *"a movement conversion means for converting a reciprocal movement of a first member into a reciprocal movement of a second member in a manner such that a directional change of movement of the second member from a lancing direction to a retreating direction is performed during a one-way stroke of the first member in one of the lancing direction and the retreating direction."* The Examiner must respectfully disagree, as set forth above List discloses a movement conversion means for converting a reciprocal movement of a first member into a reciprocal movement of a second member, note here that both the first and second members of list are slidable relative to one another via movement of toggle joint 16, in a manner such that a directional change of movement of the second member from a lancing direction to a retreating direction is (capable of being) performed during a one-way stroke of the first member in one of the lancing direction and the retreating direction, note that simultaneous movement of the toggle joint 16 perpendicular to the lancing direction and one way movement of the first member in the lancing direction would cause the second member to move in both a lancing and retreating direction during a one way stroke of the first member. This is further evidenced in that the relative



distance between the first and second members expands and then contracts as the toggle joint 16 moves perpendicular to the lancing direction see figures 1 a-d. Please note that the disclosed structure is **capable of** the claimed function and therefore anticipates the claim.

4. The Examiner would like to further point out that while features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. In re Schreiber, 128 F.3d 1473, 1477-78, 44 USPQ2d 1429, 1431-32 (Fed. Cir. 1997) and a claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987). In the instant case the List reference discloses all of the claimed structural limitations and is capable of performing the functional limitations as claimed (see explanation above).

5. Regarding Applicants arguments with respect to the Garthe reference. Applicant proffers "the reciprocal movement of the mass 60 is not converted into the reciprocal movement of the lancet holder 40 because the lancet holder 40 can reciprocate even if the mass 60 is eliminated. Applicants respectfully request clarification as to why the reciprocation of the mass 60 is converted into the reciprocation of the lancet holder 40 in spite of the fact that the lancet holder 40 makes the same reciprocation based on the profile of the cam groove 52 even in the absence of the mass 60." The Examiner respectfully disagrees with Applicants characterization of the prior art. It would initially

seem that Applicant would destroy the primary operation of the prior art by completely removing an element in order to distinguish the claimed invention over the disclosure of Garthe. The fact that Garthe discloses elements functionally connected to one another cannot be disregarded. The fact is that element 60 and pin 61 are connected to groove 53 within element 51 which contains groove 52 which holds pin 41 and element 40 such that either **manual (e.g. by hand) or automatic reciprocating movement of element 60** would cause element 61 to move within the cammed surface of groove 53 causing rotation of element 51 which in turn causes pin 41 to ride within groove 52 which in turn reciprocates element 40, thus the disclosure of the Garthe reference not only discloses the claimed structure but is capable of performing the claimed limitations as just described and set forth above.

6. The Examiner would like to further point out that while features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. In re Schreiber, 128 F.3d 1473, 1477-78, 44 USPQ2d 1429, 1431-32 (Fed. Cir. 1997) and a claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987). In the instant case the Garthe reference discloses all of the claimed structural limitations and is capable of performing the functional limitations as claimed (see explanation above).

7. Applicants arguments with regard to the newly submitted limitations set forth in amended claim 27 and new claim 28 have been fully considered and are addressed in a new ground(s) of rejection set forth above.

***Conclusion***

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Eastwood whose telephone number is (571)270-7135. The examiner can normally be reached on Monday thru Friday 9 a.m. to 5 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anh Tuan Nguyen can be reached on (571)272-4963. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. E./  
Examiner, Art Unit 3731  
2/17/2011

/(Jackie) Tan-Uyen T. Ho/  
Supervisory Patent Examiner, Art Unit 3773